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No. 02-572

IN THE

Supreme Court of the United States

INTEL CORPORATION,
Petitioner,

v.

ADVANCED MICRO DEVICES, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

PATRICK LYNCH
(*Counsel of Record*)
O'MELVENY & MYERS LLP
400 South Hope Street
Los Angeles, California 90071
(213) 430-6000

JONATHAN D. HACKER
JOSHUA P. WALDMAN
O'MELVENY & MYERS LLP
555 13th Street, N.W.
Washington, D.C. 20004
(202) 383-5300

Attorneys for Respondent

HUFF

QUESTIONS PRESENTED

28 U.S.C. § 1782 authorizes a federal district court to grant discovery to "any interested person" for use "in a proceeding in a foreign or international tribunal, including criminal investigations conducted before formal accusation." The questions presented are:

1. Whether this Court should impose a nontextual temporal "imminence" requirement in § 1782 proceedings when no court of appeals has imposed that requirement under the current version of the statute.

2. Whether this Court should apply a nontextual limitation on § 1782 to authorize discovery only for private "litigants," when the only court of appeals to have considered the question has rejected that argument, and such a reading would be contrary to the plain language of the statute, which permits applications by "any interested person."

3. Whether this Court should apply a nontextual "threshold" requirement that the party seeking discovery show that the material is already discoverable in the foreign proceeding when there is no live, intolerable conflict in the judgments of lower courts on that issue.

RULE 29.6 STATEMENT

Advanced Micro Devices, Inc. is a publicly traded corporation. There is no parent or publicly held company that owns 10% or more of the corporation's stock.

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INTRODUCTION

28 U.S.C. § 1782 authorizes a federal district court to order a person to give testimony or produce documents "for use in a proceeding in a foreign or international tribunal, including criminal investigations conducted before formal accusation." Respondent Advanced Micro Devices, Inc. ("AMD"), sought an order under § 1782 compelling the production of documents by petitioner Intel Corp. ("Intel"), for use in a proceeding in the European Commission ("EC") concerning alleged anticompetitive behavior by Intel. The district court denied the order solely on the ground that the EC proceeding is currently in a preliminary investigative stage. Pet. App. 14a-15a. The court of appeals reversed, holding that § 1782 does not impose an absolute bar to the issuance of an order when the foreign proceeding is at the investigative stage, so long as the investigation is related to judicial or quasi-judicial proceedings, as are the EC proceedings that will necessarily follow the conclusion of the current investigation. *Id.* at 5a-7a. The court of appeals further noted there is no threshold requirement that the material sought be discoverable in the foreign proceeding. *Id.* at 2a, 8a. Because the district court had not yet—and has not yet—exercised its discretion to determine whether any discovery order *should* issue pursuant to § 1782 under standard discovery rules, the court of appeals remanded for the district court to deal with "the merits of the discovery request." *Id.* at 2a.

This interlocutory decision does not merit review. Contrary to the breathless hyperbole of Intel and its amici, *see* Pet. 2 (decision "triggered full section 1782 discovery rights"); *id.* at 20 (decision "will impose . . . onerous and often one-sided discovery burdens"); Br. of Nat'l Ass'n of Mfrs. as *Amicus Curiae* in Support of Pet'r at 1 ("the Ninth Circuit's sweeping expansion of § 1782 discovery will inflict serious harms and lead to widespread abuse"); Br. of Chamber of Commerce as *Amicus Curiae* in Support of Pet'r at 2

(decision allows "nearly unlimited access to business documents and competitive plans"), as yet there are *no* discovery obligations imposed on Intel, onerous or otherwise. They certainly are not "one-sided": Intel has filed its own cross-application for discovery under § 1782. Because no judicial authority under § 1782 has yet been exercised, Intel's challenge to the exercise of such authority is purely hypothetical.

Nor do the questions addressed by the court of appeals merit review on their own terms. *No* court anywhere has accepted Intel's principal submission that § 1782 authorizes discovery only for a "litigant" in a "pending" judicial or quasi-judicial proceeding. That argument is contrary to the plain language and clear history of the statute, and every court to have considered the question agrees that discovery under the current version of § 1782 is authorized for "any interested person" during a foreign administrative, civil or criminal investigation, so long as the investigation is likely to result in judicial or quasi-judicial proceedings. Despite Intel's protestations, the indisputable fact is that the current investigation will *necessarily* lead directly to EC proceedings that are either judicial or quasi-judicial.

Intel's real argument is that such proceedings are not temporally "imminent." No circuit other than the Second has adopted a nontextual requirement that adjudicative proceedings be not just likely to occur—which is the case here—but "likely to occur very soon." Even the Second Circuit adopted that view only under a *prior* version of the statute, which has since been clarified so as clearly to reject any temporal "imminence" requirement. And the Second Circuit understood its requirement as *allowing* discovery during an investigative stage of a proceeding, which would authorize a § 1782 order here.

The court of appeals also addressed the question whether § 1782 requires a party seeking discovery to make a "threshold showing" that the materials would also be discoverable

in the foreign proceeding. Pet. App. 8a. The court answered that question no, correctly noting that "nothing in the plain language or legislative history" of the statute supports the imposition of such a requirement. *Id.* The supposed conflict asserted by Intel on this question rests ultimately on a single Third Circuit decision that the Third Circuit has recently made clear does *not* require threshold proof of discoverability. Especially in light of the current interlocutory, abstract posture of this case, the Court should await further percolation of this issue, which may well be resolved conclusively when other courts have an opportunity to address their misinterpretation of the earlier Third Circuit decision. Certiorari should be denied.

STATEMENT OF THE CASE

1. Petitioner Intel Corporation ("Intel") and Respondent Advanced Micro Devices ("AMD") are competitors in the microprocessor industry. AMD believes that Intel abuses its dominant position in the European Common Market in violation of Article 82 of the European Community Treaty, which forbids "[a]ny abuse by one or more undertakings of a dominant position within the common market." 3 E.R. 518.

The European Commission is responsible for enforcing that prohibition, *see* Article 85 (3 E.R. 519), and if it finds a violation, "it may by decision require" the party infringing Article 82 "to bring such infringement to an end," and can impose monetary fines and penalties on the infringer, Regulation 17, Articles 3(1), 15, and 16 (3 E.R. 526, 531-32).[1]

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[1] The EC's amicus brief asserts that the decision below "fundamentally misconstrues the nature of the European Commission." Br. of the Comm'n of the European Communities as *Amicus Curiae* in Support of Pet'r at 4 ("EC Br."). The EC does not point to a single statement in the Ninth Circuit decision that incorrectly describes the Commission's mandate or procedures. The Court of Appeals certainly recognized that the EC functions as a law enforcement agency and very clearly understood

Article 83 of the Treaty also grants the Commission regulatory power, 3 E.R. 518, and pursuant to that authority the Commission has set forth the procedures by which it adjudicates alleged infringements of Article 82. As relevant here, "natural or legal persons who claim a legitimate interest" can submit a complaint to the Commission alleging a violation of Article 82. 3 E.R. 526. AMD filed such a complaint against Intel on October 23, 2000.

Once such a complaint is filed, the Commission is obligated to begin an investigation to determine the merits of the complaint. 1 E.R. 10. The Commission can gather information from the alleged monopolist. The complaining party also has its own formal, independent right under the Article to participate in the investigation by submitting briefs, documents, or other information, as well as the testimony of witnesses and experts. *Id.* at 11.

If the Commission concludes that there is no infringement of Article 82, it must notify the complaining party of that fact, *id.* at 10-11; Regulation 2842/98, Article 6 (3 E.R. 537), and the complaining party is entitled to request a public hearing and access to the Commission's investigative file. 1 E.R. 11. The Commission then must consider any additional evidence or comments submitted by the complaining party, and if it still declines to pursue the complaint, the complaining party is entitled to seek judicial review of that decision in the Court of First Instance and then in the Court of Justice for the European Communities. *Id.* at 11, 13; Pet. App. 4a.

If the Commission decides to proceed with the complaint, the alleged infringer is given what is known as a "statement of objections" that specifies the alleged infringements. 1 E.R. 11. The alleged infringer has a right to a hearing and a right to comment on the statement. 1 E.R. 11;

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that "the Commission's status may not fit perfectly within concepts of United States law." *Id.*

Regulation 17, Article 19 (3 E.R. 532). The complaining party also has a right to submit briefs, documents, other evidence, and expert and witness testimony. 1 E.R. 11. The hearing is conducted before "an independent person experienced in competition matters who has the integrity necessary to contribute to the objectivity, transparency and efficiency of those proceedings" and the Commission imposes further procedures designed to "ensure the independence of the hearing officer." Commission Decision of 23 May 2001, 2001/462/EC (3 E.R. 584). At the end of the hearing, the independent officer "shall report to . . . the Commission on the hearing and the conclusions he draws from it." *Id.*, Article 13(1) (3 E.R. 586).[2] The Commission then makes a final decision regarding the complaint. Specifically, the Commission will either issue a final, enforceable decision against the infringer, or it will dismiss the case. Pet. App. 4a. Both decisions are subject to judicial review. *Id.*; 1 E.R. 13.

2. 28 U.S.C. § 1782 authorizes a federal district court to grant discovery for use in a proceeding in a foreign tribunal. The current version of the statute reads in relevant part:

> The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal, including criminal investigations conducted before formal accusation. The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal, or upon the application of any interested person and may direct that the testimony or statement be given, or the document or thing be produced, before a person appointed by

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[2] While this report does include "observations . . . concern[ing] procedural issues," 3 E.R. 586, contrary to Intel's claim (Pet. 16 n.4), the report is not "solely" about those issues.

> the court. . . . To the extent that the order does not prescribe otherwise, the testimony or statement shall be taken, and the document or other thing produced, in accordance with the Federal Rules of Civil Procedure.

28 U.S.C. § 1782. The broad language of the current statute significantly modifies previous versions of this law.

One such change is the type of proceedings for which a district court may order discovery. In 1863, Congress authorized district courts to issue discovery orders only if they were to be used "in any suit for the recovery of money or property . . . in any court in any foreign country." Act of Mar. 3, 1863, 12 Stat. 769, 769. In 1948, Congress changed the statute to permit discovery orders to be used "in any civil action . . . in any court in a foreign country." Act of June 25, 1948, ch. 646, 62 Stat. 869, 949. In 1964, however, Congress again amended the statute, substantially expanding a district court's authority to grant discovery orders for use "in a proceeding in a foreign or international tribunal." Pub. L. No. 88-619, § 9, 78 Stat. 995, 997. Congress explained clearly why it made this change:

> A rather large number of requests for assistance emanate from investigating magistrates. The word "tribunal" is used to make it clear that assistance is not confined to proceedings before conventional courts. For example, it is intended that the court have discretion to grant assistance when proceedings are pending before investigating magistrates in foreign countries. . . . In view of the constant growth of administrative and quasi-judicial proceedings all over the world, the necessity for obtaining evidence in the United States may be as impelling in proceedings before a foreign administrative tribunal or quasi-judicial agency as in proceedings before a conventional foreign court. Subsection (a) therefore provides the pos-

> sibility of U.S. judicial assistance in connection with all such proceedings. Finally, the assistance made available by subsection (a) is also extended to international tribunals and litigants before such tribunals.

S. Rep. No. 88-1580, *reprinted in* 1964 U.S.C.C.A.N. 3782, 3788. Professor Hans Smit—"the dominant drafter of, and commentator on, the 1964 revision of 28 U.S.C. § 1782," *In re Letter of Request from the Crown Prosecution Service of the United Kingdom*, 870 F.2d 686, 689 (D.C. Cir. 1989) (R.B. Ginsburg, J.)[3]—confirmed the point: "The term 'tribunal' embraces all bodies exercising adjudicatory powers, and includes investigating magistrates, administrative and arbitral tribunals, and quasi-judicial agencies, as well as conventional civil, commercial, criminal, and administrative courts." Smit, *International Litigation Under the United States Code*, 65 Colum. L. Rev. 1015, 1026 n.71 (1965).

Congress also amended § 1782 in 1964 to permit discovery orders even before proceedings in a foreign tribunal are underway. While the 1863 statute authorized district courts to order discovery "to be used in any suit . . . *[p]ending* in any court in any foreign country," 12 Stat. at 769 (emphasis added), and the 1948 statute permitted discovery orders "to be used in any civil action *pending* in any court in a foreign country," 62 Stat. at 949 (emphasis added), the 1964 amendments to § 1782 specifically deleted the word "pending" from the statute. The word "pending" was eliminated

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[3] "Professor Smit functioned as the Director of the Project on International Procedure at the Columbia Law School beginning in June 1960. He also acted as the Reporter to the United States Commission on International Rules of Judicial Procedure, a body created by Congress first to study United States rules relating to litigation with international aspects, then to propose appropriate legislative reforms. The Commission's proposals [were] all . . . accepted by Congress without change . . . . Amended 28 U.S.C. § 1782 was one of the products of the Commission's efforts." *Crown Prosecution*, 870 F.2d at 690 n.2.

specifically "to facilitate the gathering of evidence *prior to the institution of litigation abroad.*" *International Litigation*, *supra*, at 1026-27 n.72 (emphasis added). "[I]t is not necessary for the proceeding to be pending at the time the evidence is sought, but only that the evidence is *eventually to be used* in such a proceeding." *Id.* at 1026 (emphasis added).

As if to emphasize that very point, Congress amended the law again in 1996, to make clear that a district court may grant a discovery order for use in a proceeding in a foreign or international tribunal "including criminal investigations conducted before formal accusation." Pub. L. No. 104-106, § 1342, 110 Stat. 186, 486 (1996).[4]

3. On October 1, 2001, AMD filed an application under 28 U.S.C. § 1782 in the United States District Court for the Northern District of California. In its application, AMD sought an order directing Intel to produce documents for use in the proceedings before the Commission. Specifically, AMD sought documents that Intel had produced in a case in the Northern District of Alabama involving monopolizing charges against Intel, as well as transcripts of testimony provided in that case. AMD submitted evidence establishing that these documents are relevant to the EC proceedings, because they would impeach positions that Intel has taken with the Commission and support AMD's complaint that Intel abuses its dominant position. 1 E.R. 8.[5]

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[4] Congress liberalized the discovery available under § 1782 in other ways as well. The 1964 amendments permit "any interested person" to seek a discovery order, authorize orders to compel the production of a document or other tangible evidence, and eliminate the requirement that the United States be "at peace" with the nation in which the foreign proceeding occurs.

[5] The fact that EC investigators did not seek the documents themselves is utterly immaterial to AMD's right to rely upon them in subsequent adjudicative proceedings. *See infra* notes 8 & 9.

The district court denied AMD's application. It held that "[t]he case is in the initial stage of preliminary inquiry," and because that stage is not itself adjudicative, it is not a "proceeding" within the meaning of § 1782. Pet. App. 14a-15a.

The Court of Appeals reversed. It began by noting the many ways in which § 1782's amendments "broadened the discretion of district courts to act on foreign assistance requests." Pet. App. 5a. Specifically, the court observed that "the language used by Congress in Section 1782 is broad and inclusive, including by way of example even criminal investigations prior to formal accusation." *Id.* The court also noted that Congress had deleted the word "pending" from the statute, and had chosen the expansive word "tribunal" so that § 1782 would "include bodies of a quasi-judicial or administrative nature as well as preliminary investigations leading to judicial proceedings." *Id.* at 5a & n.2 (internal quotation marks and citations omitted).

The court then held that because the Commission is "authorized to enforce the EC Treaty with written, binding decisions, enforceable through fines and penalties" and because its "decisions are appealable to the Court of First Instance and then to the Court of Justice . . . the proceeding for which discovery is sought is, at a minimum, one leading to quasi-judicial proceedings." *Id.* at 6a. The court further held that those proceedings do not have to be "imminent," noting that Congress made that result "clear" when it eliminated the word "pending" from the statute. *Id.* Because the Commission's investigation "will lead to" a judicial or quasi-judicial proceeding, discovery is permissible under § 1782. *Id.*

As to discoverability, the court below found "nothing in the plain language or the legislative history of Section 1782, including its 1964 and 1996 amendments, to require a threshold showing on the party seeking discovery that what is sought be discoverable in the foreign proceeding." *Id.* at 8a. Having determined that the district court was authorized

to grant AMD's request under § 1782, the court of appeals remanded the case to the district court to "proceed to consider AMD's request on the merits." *Id.* at 9a. The court subsequently denied a request for a stay of the order, but the district court has not yet taken any action on AMD's request. Intel has, however, itself sought to invoke § 1782, filing a cross-application for discovery from AMD. *See* Notice of Application and Cross-Application of Intel Corporation for Order Pursuant to 28 U.S.C. § 1782 (Case No. 01-7033) (N.D. Cal.) (filed Oct. 11, 2002). The magistrate just this week issued an order directing AMD to file a new application for discovery explaining "with reasonable particularity" the specific "items to be inspected," and limited to "documents that are relevant to the pending allegations." *See* Interim Order (Case No. 01-7033) (N.D. Cal.) (Dec. 11, 2002), *reprinted in* Appendix to this Brief in Opposition ("App.") at 6a (quoting Fed. R. Civ. P. 34). The judge scheduled a hearing on the parties' applications for January 10, 2003. *Id.*

REASONS FOR DENYING THE WRIT

The petition for certiorari should be denied. The decision below comports in all respects with the plain language and legislative history of the statute; it is only Intel's views that contradict both the language and history of § 1782. While none of the questions Intel raises merits review individually, *see infra* Part II, there is a threshold vehicle problem that infects its entire petition: no court has exercised any power under § 1782, rendering Intel's challenge to the exercise of that power at this time speculative and premature.

I. CERTIORARI SHOULD BE DENIED BECAUSE THE CASE IS INTERLOCUTORY

The decision of the court of appeals reverses a threshold determination by the district court that § 1782 does not authorize consideration of AMD's application for discovery, and remands the case for consideration of AMD's application "on the merits." Pet. App. 9a. The district court's deci-

sion whether to grant discovery to either party (now that Intel has also invoked § 1782) is discretionary with that court. *See, e.g., Four Pillars Enters. Co. v. Avery Dennison Corp.*, 308 F.3d 1075, 1078 (9th Cir. 2002) ("Congress gave the federal district courts broad discretion to determine whether, and to what extent, to honor a request for assistance under 28 U.S.C. § 1782."). The court of appeals *did* reject Intel's submission that § 1782 erects certain absolute bars to the provision of *any* relief, but the court of appeals decision does not itself subject Intel to any discovery obligations under § 1782. It is only after the district court has issued an order compelling the production of documents—after the January 10, 2003 hearing, App. 6a—that there will be a final order in this case ripe for review by this Court.

By long-settled practice, this Court typically "await[s] final judgment in the lower courts before exercising [its] certiorari jurisdiction." *Virginia Military Inst. v. United States*, 508 U.S. 946, 946 (1993) (Scalia, J., concurring in the denial of certiorari); *see Texas v. Hopwood*, 518 U.S. 1033, 1034 (1996) (Ginsburg, J., respecting denial of certiorari) ("we must await a final judgment on a program genuinely in controversy before addressing the important question raised in this petition"); *Mazurek v. Armstrong*, 520 U.S. 968, 975 (1997) (when a "case comes to us prior to the entry of a final judgment in the lower courts . . . we are ordinarily reluctant to exercise our certiorari jurisdiction"); *Bhd. of Locomotive Firemen v. Bangor & Aroostook R. Co.*, 389 U.S. 327, 328 (1967) ("because the Court of Appeals remanded the case, it is not yet ripe for review by this Court"); *Hamilton-Brown Shoe Co. v. Wolf Bros.*, 240 U.S. 251, 258 (1916) ("except in extraordinary cases, the writ is not issued until final decree"). There are no extraordinary circumstances warranting departure from the fundamental rule here. The decision below certainly is not "clearly erroneous under [this Court's] precedents," *Mazurek*, 520 U.S. at 975; not only is the decision below clearly correct under the language and history of

the statute, the petition does not identify even one precedent of this Court as affecting the resolution of the case. The decision below also does not act "immediately" on Intel, *see id.*; to the contrary, the entire purpose of the remand proceeding yet to occur is to decide *what* obligations, if any, are to be imposed. Nor does the decision below implicate any question of underlying jurisdiction. *See Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 52 (1938).

This case illustrates the wisdom of the Court's standard practice. Because Intel's interpretation of § 1782 finds little or no support in the text or history of the statute, much of its plea for certiorari is premised on policy-type arguments against § 1782 discovery—arguments that cannot be fairly examined in the abstract, without a true record of discovery to review. Intel warns, for example, of "unfair discovery burdens," Pet. 3; "costly fishing expeditions," *id.* at 18; and "open[ing] . . . the floodgates," *id.* For the reasons elaborated below, we submit that these claims lack foundation even in theory. But even supposing an order under § 1782 could pose such problems, it is flatly impossible to evaluate such claims—and thus Intel's case for certiorari—where there has not yet been *any* discovery burden imposed on Intel. Unlike Intel, AMD fully expects that the district court in this case will act responsibly and in accordance with the usual rules governing discovery, demonstrating how § 1782 can be used in measured fashion to provide appropriate and relevant discovery. *See Four Pillars*, 308 F.3d at 1080 ("district courts are in the best position to review the details of a § 1782 request and to determine whether judicial assistance is justified" (alterations and internal quotation marks omitted)). The magistrate judge's recent interim order evinces exactly that kind of measured approach. App. 6a (requiring new application for discovery of documents specifically relevant to issues in European proceeding). If it does not turn out to be so, this Court can always review Intel's claims

later, on a *real* discovery record, as opposed to the hypothetical fishing expedition imagined by Intel and its amici.

The same is true for Intel's ominous declarations that the decision below stands as an "affront to principles of international comity," Pet. 3; "subvert[ing]" and "flouting" foreign tribunals, and "enabl[ing] any company to interfere with mergers subject to cross-border review," *id.* at 18. Again, the grievous wounds inflicted on foreign tribunals by the decision are, at this stage, imaginary at best. This case does not involve a cross border merger, and is no precedent for how § 1782 would apply to merger proceedings. Nor has there been any subversion or flouting of the EC. AMD takes the EC's position in this case very seriously, and would not be proceeding if the EC expressed any objection to the procedure AMD has invoked to obtain evidence to support its case against Intel or to consideration of the evidence that might be elicited. No such objection has been made.

To be sure, the EC does suggest that, as a more general matter, the decision below may threaten its "Leniency Program." EC Br. 6. That program encourages companies to reveal legal violations in exchange for leniency, and those disclosures remain confidential. *Id.* The threat to the Leniency Program perceived by the EC follows from a simple misunderstanding of this case and the decision below. The EC's submission is premised on its belief that the decision below authorizes courts "to routinely order the production of [Leniency Program] documents." *Id.* at 7. In fact, AMD does not seek *any* documents that were submitted to the EC—let alone Leniency Program documents—and no party contends that such documents are even arguably within AMD's discovery request. If Leniency Program materials were ever part of any discovery order actually issued by the district court below or any other, then the EC could intervene in those proceedings—as it has done in the past, *id.*—and the district court could respond appropriately. The EC cites no

instance in which a district court has failed to protect the EC's Leniency Program interests, and it suggests no reason for such concern here. *See Four Pillars*, 308 F.3d at 1079 ("If a district court is concerned that granting discovery under § 1782 will engender problems a particular case, it is well-equipped to determine the scope and duration of that discovery." (internal quotation marks omitted)). Again, if the district court (or court of appeals) somehow failed to protect Leniency Program confidentiality, this Court could review that decision at the appropriate time.

Of course, the EC will always retain control over the *admissibility* of documents in its proceedings, it can choose simply to ignore additional discovery obtained in the U.S. under § 1782. *See In re Application of Euromepa S.A.*, 51 F.3d 1095, 1101 (2d Cir. 1995) ("*Euromepa I*") (Calabresi, J.); *infra* at 27. But even if one paternalistically worries over the capacity of the EC to cope with the submission of evidence obtained in the United States, the force of such worries can be measured only by reference to *actual* discovery commanded by *actual* orders under § 1782. If the discovery ultimately ordered by the district court somehow appears to be a genuine insult to the EC proceedings, and the court of appeals does not address that problem, this Court can resolve that concern at the appropriate time.

In short, every reason of international comity cited by Intel cuts *against* reaching out to decide questions on a record that is purely abstract and hypothetical. The supposed geopolitical costs imposed by judicial application of the general § 1782 discovery power simply cannot be assessed meaningfully in a case lacking judicial application of that power. This Court should await a final order before even considering whether § 1782 would be improved by addition of the nontextual limitations Intel seeks.

II. THE QUESTIONS PRESENTED DO NOT MERIT REVIEW ON THEIR OWN TERMS

Not only is the decision below unripe for review, the questions Intel raises do not warrant certiorari on their own terms. In the order addressed in (or implicated by) the decision below, the questions properly presented are: (1) whether § 1782 authorizes discovery when no foreign judicial or quasi-judicial proceeding is "pending" or temporally "imminent"; (2) whether § 1782 authorizes discovery for "private, non-litigants"; and (3) whether § 1782 requires that a party seeking discovery make a threshold showing of the material's discoverability in the foreign proceeding for which it is to be used.

A. Certiorari Should Not Be Granted To Decide Whether Courts Should Apply A Nontextual Temporal "Imminence" Requirement In § 1782 Proceedings

1. Intel's first argument is that the court below erred in authorizing consideration of AMD's discovery request because no adjudicative-type proceeding is currently "pending" in the EC. The "most natural reading" of § 1782, says Intel, is that discovery is authorized "only if . . . a 'proceeding' is already underway before a foreign 'tribunal.'" Pet. 13.

That argument borders on the frivolous. As noted above, in 1964 Congress deleted the word "pending" from the statute for the *specific purpose* of allowing discovery of materials prior to the institution of litigation in the foreign jurisdiction. *See supra* at 7-8. Accordingly, every circuit that has addressed this question has agreed with then-Judge Ginsburg that the "judicial proceeding for which assistance is sought . . . need not be pending at the time of the request for assistance" before an order may issue under § 1782. *Crown Prosecution*, 870 F.2d at 687; *see In re Request for Int'l Judicial Assistance (Letter Rogatory) for the Federative Republic of Brazil*, 936 F.2d 702, 706 (2d Cir. 1991) ("*Brazil*");

In re Letters Rogatory from Tokyo Dist., 539 F.2d 1216, 1218 (9th Cir. 1976) ("*Tokyo*") (joined by Kennedy, J.).[6] On at least two separate occasions, the United States has also agreed that § 1782 "authorizes judicial assistance even in the absence of a pending foreign proceeding." Br. for Resp't at 8, *Azar v. Minister of Legal Affairs of Trinidad & Tobago*, 488 U.S. 1005 (1989) (No. 88-559); *see Brazil*, 936 F.2d at 706 (citing Brief for Appellee). There is thus no basis for review of the question whether a judicial proceeding must be "pending" before a discovery order may issue under § 1782.[7]

2. While it is clear that an adjudicative-type proceeding need not be "pending," all courts agree that § 1782 authorizes discovery during an investigation only so long as the investigation is connected to an eventual adjudicative proceeding. As the principal drafter of § 1782 explained, "[i]t is not necessary . . . for the proceeding to be pending at the

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[6] In *In re Request for Assistance from Ministry of Legal Affairs of Trinidad & Tobago*, 848 F.2d 1151 (11th Cir. 1988) ("*Trinidad & Tobago*"), *cert. denied*, 488 U.S. 1005 (1989), the Eleventh Circuit held that proceeding need not be pending in a case involving a request by a foreign official, *id.* at 1154-55. In dicta the court suggested the result "may" be different for a private party, 848 F.2d at 1155, but the Eleventh Circuit has never held to that effect.

[7] The statute was recently amended to clarify that courts may order the production of documents for "use in a proceeding in a foreign or international tribunal, *including criminal investigations conducted before formal accusation*." If discovery is allowed for such pre-litigation proceedings as criminal investigations, there necessarily can be no requirement that litigation be "pending." Intel misunderstands this amendment as constituting a "limit[]" on "the category of investigations eligible for pre-litigation discovery," Pet. 13; in fact, the word "including" is an expansive term, not a limiting one. *See, e.g., Chickasaw Nation v. United States*, 534 U.S. 84, 89 (2001); *West v. Gibson*, 527 U.S. 212, 217 (1999) ("But the preceding word 'including' makes clear that the authorization is not limited to the specified remedies there mentioned."); *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 189 (1941) ("To attribute such a function to the participial phrase introduced by 'including' is to shrivel a versatile principle to an illustrative application.").

time the evidence is sought, but only that the evidence is eventually to be used in such a proceeding." *International Litigation*, *supra*, at 1026. Accordingly, in an opinion joined by then-Judge Kennedy, the Ninth Circuit has held that it is enough for an applicant to show that information requested during an investigation "is for use in completion of the investigation and in future trials." *Tokyo*, 539 F.2d at 1218-19. Likewise, the D.C. Circuit, per then-Judge Ginsburg, held that "it suffices that the proceeding in the foreign tribunal and its contours be in *reasonable contemplation* when the request is made." *Crown Prosecution*, 870 F.2d at 687 (emphasis added); *see also Trinidad & Tobago*, 848 F.2d at 1156 ("The district judge should satisfy himself that a proceeding is very likely to occur.").

There is thus no dispute among the circuits that discovery is allowable under § 1782 during the investigative stage of a proceeding only if the investigation is connected to a likely adjudicative proceeding. Nor is there a genuine dispute here that the current EC investigation will result in such a proceeding one way or the other. As the court of appeals correctly concluded:

> Here the Directorate's investigation will lead to a decision whether to proceed. A decision not to go forward would be appealable to the Court of First Instance, thus "leading to a judicial proceeding." A decision to proceed with a complaint would lead to hearings that are at least quasi-judicial in nature and then to an enforceable, judicially-reviewable decision.

Pet. App. 6a; *accord In re Application of Nat'l Broad. Co.*, 1998 WL 19994, at *6 (S.D.N.Y. Jan. 21, 1998) ("intergovernmental tribunals such as the Court of Justice of the European Economic Community and administrative proceedings before the EEC Commission" qualify as "tribunals" under § 1782), *aff'd* 165 F.3d 184 (2d Cir. 1999). Indeed, the principal drafter of the 1964 amendment explained that the

change was intended to include the exact proceedings at issue in this case—that is, to "permit[] the rendition of proper aid in proceedings before the EEC Commission in which the Commission exercises quasi-judicial powers, including proceedings under Article 19 of Regulation 17." *International Litigation*, *supra*, at 1027 n.73; *see also supra* at 4-5 (describing alleged infringer's right to a hearing under Article 19 of Regulation 17).

Intel attempts to take issue in its petition with this consensus view of EC proceedings, but it does not seek review of the court of appeals' description of EC proceedings. It seeks only consideration of the question whether an adjudicative proceeding must be likely to occur *very soon*. Pet. 13. That such a proceeding will *in fact* occur upon completion of the investigation is not in doubt.

The EC's brief does not demonstrate to the contrary. The EC's submission is premised on the understanding that the decision below held that the current investigation is itself an adjudicative proceeding before a tribunal. EC Br. 4. The EC is mistaken. *See* Pet. App. 3a ("This initial investigation is not considered an adversarial proceeding."). What the court held is that the current investigation necessarily will lead to an adjudicative proceeding: either the quasi-judicial hearing that occurs if a statement of objections is issued, or the judicial review to which AMD is entitled if the statement is not issued. Pet. App. 6a. There is no serious question that those are both adjudicative in nature; indeed, they are the very "circumstances" in which the EC "function[s] as a 'tribunal,'" EC Br. 3, and in which its proceedings "partake of an adjudicatory character," *id.* at 4.[8] If the decision below holds

[8] Although the EC later states that it "*never* adjudicates disputes between parties," *id.*, and "does *not* adjudicate the rights of parties," *id.* at 5, it does acknowledge that it receives complaints, decides whether a violation of the law has occurred, and punishes the offender. *Id.* at 4-5. That is the very essence of adjudication, even if only one private party is

what the EC believes it holds, then there would have been no need to address the temporal "imminence" of the adjudicative-type proceedings, rendering that discussion dicta and the case an inappropriate vehicle for considering the temporal "imminence" question Intel presents.

3. In fact, the court of appeals correctly held that nothing in the text or history of the statute supports an artificial, per se "timing" limitation on the imminence of the adjudicative-type proceeding to which the investigation is connected. Pet. App. 6a. In so holding, the court followed its earlier precedent in *United States v. Sealed 1*, 235 F.3d 1200 (9th Cir. 2000):

> Focusing on the plain language of the statute, as we must, we note that the word "imminent" does not appear. Surely, had Congress wanted to authorize assistance to foreign investigations only when foreign proceedings are imminent, it could have said so. It is also impossible to read an imminence requirement into the statute following the 1996 amendment to § 1782 (authorizing assistance in "criminal investigations conducted before formal accusations") without

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directly involved. In any event, § 1782 does not require that AMD be a party to, or a "litigant" in, the proceeding before a foreign tribunal. *See infra* at 23-25. As the Ninth Circuit decision makes clear, even if proceedings before the EC are not adjudicative (and they are), those proceedings will lead to adjudicative proceedings, as the EC itself acknowledges. EC Br. 5 n.5. The whole point of this discovery proceeding relates to AMD's right under EC law to present the Commission with evidence. *Koelman v. E.C. Commission*, [1996] 4 CMLR 636, 649 (CFT (4th Chamber) 1996). If the Commission fails to give proper consideration to that evidence submitted by AMD, AMD is entitled as a matter of right to challenge the Commission's actions in the European courts. *BEUC v. E.C. Commission*, [1995] 4 CMLR 167 (CFI (2d Chamber) 1994). This is entirely different from the situation in the United States of a "person reporting an alleged violation of law to a public authority." EC Br. 5.

> leading to an absurd result. Appellant's insistence on "imminence" would create an untenable Catch-22 for foreign law-enforcement authorities seeking U.S. aid: investigators would be unable to receive such help before proceedings actually became imminent, and yet the proceedings might never become imminent because the investigators would be stymied in collecting evidence necessary to justify the filing of criminal charges.

235 F.3d at 1205.[9]

The only circuit to have endorsed any form of a temporal "imminence" requirement is the Second, but it did so under a previous version of § 1782, and it has yet to squarely address the question under the current version of the statute. The

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[9] Indeed, the present circumstances demonstrate precisely the "untenable Catch-22" that would result from a temporal "imminence" requirement. If the EC decides not to issue a statement of objections, AMD is entitled to seek judicial review of that decision, *see supra* at 4, but judicial review is based on the evidence before the EC. Thus, if AMD is not able to obtain the discovery it seeks now and to put that evidence before the EC's investigators—as is AMD's right under EC procedures—it will have no opportunity to have that evidence considered on judicial review. Yet Intel's temporal "imminence" requirement would prohibit AMD from getting the discovery it seeks until judicial review is underway (or at least very nearly so)—precisely when AMD can no longer introduce the evidence it seeks. That is, Intel reads § 1782 as authorizing AMD to obtain discovery only when its opportunity to introduce the evidence is over or very soon to be over.

That Catch-22 also demonstrates why Intel's repeated implication that EC investigators have not requested this information misses the point. AMD seeks to obtain the discovery in question so that it can submit it to the EC for inclusion in its investigative file. AMD is specifically given the right to submit evidence under EC procedures, which evidence AMD is entitled to rely upon in subsequent judicial review proceedings. Accordingly, even if the EC investigators themselves are not interested in that evidence, the EC's *courts*, upon judicial review, may find that discovery highly relevant.

Second Circuit first read a temporal imminence requirement into the statute in *Brazil*, 936 F.2d at 705-07. The court began by noting that the 1964 amendment to § 1782 "omits the qualifying word 'pending,'" but questioned "whether the deletion of 'pending' was intentional or inadvertent." *Id.* at 705. The Second Circuit reasoned:

> If the omission of "pending" was intended to mean "eventually occurring," we would expect to see at least some hint of that thought in the authoritative reports issued by the members of the Senate and House committees.

Id. at 706. Unable to find a snippet of legislative history confirming that the deletion of "pending" means that "pending" is no longer a statutory requirement, the Court reluctantly decided no longer to require that proceedings be "pending," but imposed a different—wholly extratextual—limitation on the statute, simply out of fear that the deletion of "pending" might have been accidental:

> Though we will not insist that proceedings be "pending," we think it prudent, in the absence of any indication as to why Congress deleted the word "pending" and in view of the distinct possibility that the deletion might have been inadvertent, to require that adjudicative proceedings be imminent—very likely to occur *and very soon to occur*.

Id. (emphasis added). The Second Circuit's "legislative accident" theory is inexplicable, not only because Congress is not normally presumed to delete material statutory terms for no reason, but also because we *do* have a contemporaneous record of the reason for the change. *See supra* at 7-8.

In any event, Congress has since provided all the "indication[s]" of its intent any court could need, making clear that deletion of the word "pending" has just the consequences the primary draftsman of the 1964 amendments intended and

other courts have recognized. Congress amended § 1782 in 1996 to make explicit that § 1782 discovery is available for proceedings in foreign tribunals "including criminal investigations conducted before formal accusation." *See supra* at 8. If the deletion of the word "pending" in 1964 had been accidental and therefore meaningless, the 1996 amendment would have made no sense. Quite plainly, if discovery is available "before" formal accusation, Congress could not have meant to require that discovery be available only for use in a "pending" foreign proceeding. *See supra* note 7.

The Second Circuit has had no occasion to squarely address its imminence requirement since the 1996 amendments. Its subsequent cases have all involved foreign litigation already pending or completed. *See In the Matter of Lancaster Factoring Co.*, 90 F.3d 38, 42 (2d Cir. 1996) (pending); *In re Euromepa S.A.*, 154 F.3d 24, 29 (2d Cir. 1998) ("*Euromepa II*") (completed); *In re Application of Ishihara Chem. Co.*, 251 F.3d 120, 125-26 (2d Cir. 2001) (completed); *cf. In re Application of Esses*, 101 F.3d 873, 875 (2d Cir. 1996) ("imminence" issue dropped from case). The Second Circuit thus has not yet addressed how it would construe the *current* version of § 1782 in the context of a *future* proceeding in a foreign tribunal. *See Ishihara Chem.*, 251 F.3d at 126-27 (declining to address question of future proceeding because not raised below).

In any event, the Second Circuit's supposed imminence requirement would not have produced a different result in this case. Just two years after discovering the requirement in *Brazil*, the court addressed it in *In re Erato*, 2 F.3d 11 (2d Cir. 1993). In that case, the Netherlands requested a district court order for the testimony of a witness for use in a criminal "investigation." *Id.* at 12. The witness whose testimony was sought, however, argued that the "proceeding in the Netherlands is investigative at this stage, rather than judicial," and thus § 1782 was not available. *Id.* at 15. In re-

sponse to that argument, the Second Circuit expressed "doubt" about its "force," noting that § 1782 "permits judicial assistance even where adjudicative proceedings are not pending as long as they are imminent." *Id.* If discovery for an "investigation" in the Netherlands could satisfy the court's "imminence" test, then it is difficult to fathom how the investigation currently underway before the European Commission would fail that test, assuming the requirement continues to exist at all. Even the Second Circuit's outmoded temporal imminence requirement, in other words, would not change the result of this case.

Accordingly, there is no live, intolerable split in the circuits of consequence to this case on the question whether § 1782 includes a temporal imminence requirement. There is therefore no basis for review of this issue.

B. Certiorari Should Not Be Granted To Decide Whether Courts Should Apply A Nontextual Limitation On § 1782 To Authorize Discovery Only for Private "Litigants"

Intel also urges review on the ground that AMD is not currently a "litigant" in an EC proceeding, but a "complainant" in the current investigative stage of the proceeding, and "Congress gave no indication that it intended to authorize discovery by private persons other than . . . litigants." Pet. 17. In truth, the plain text of the statute gives the clearest possible indications that it is *not* limited to "litigants" in foreign proceedings. As discussed above, deletion of the word "pending" demonstrates that there need not be any *current* foreign proceeding in which an applicant could be a litigant. *See supra* at 15-16. The statute explicitly confirms the point, providing that a district court may grant a discovery order

"upon the application of *any interested person*"—as opposed to "the application of a *litigant*."[10]

Not only is the suggestion that the statute is limited to "litigants" patently meritless,[11] it has generated no controversy in the lower courts. Only one court of appeals has addressed this issue expressly. In *Trinidad & Tobago*, the party opposing a § 1782 discovery order pointed to isolated instances in the legislative history where Congress used the word "litigant," and argued from those instances that § 1782 should be confined to requests made by litigants. Intel points to similar legislative history here. Pet. 17 n.7.[12] Although Intel cites *Trinidad & Tobago* favorably, that court actually *rejected* an argument essentially indistinguishable from Intel's: "Congress did *not* use the word 'litigant' [in the legislative history] to encompass all types of 'interested persons,' but used the word as a common example of an 'interested

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[10] Article 82 of the EC Treaty, which permits any "natural or legal persons who claim a legitimate interest" to submit a complaint to the EC, *see supra* at 4, uses language similar to § 1782, which permits "any interested person" to apply for a discovery order. Moreover, as noted above, *supra note* 9, AMD's "interest" under EC rules constitutes direct procedural rights, including a right of appeal. A party with a vested right of appeal, if not a litigant, has a direct stake in the proceeding.

[11] Intel tries to support its argument (Pet. 13) by analogy to an entirely separate statute (15 U.S.C. § 6203(a)) that authorizes civil discovery in antitrust cases upon application by the Attorney General. Intel contends that because this entirely separate statute limits discovery to applications by the Attorney General, if § 1782 were intended to confer discovery rights to "*private* entities," then Congress "would have done so." Pet. 13. Congress *did* do so, rather clearly: § 1782 authorizes a court to order discovery upon request by "any interested person."

[12] Intel also relies (Pet. 17 n.6) upon *In the Matter of Lancaster Factoring Co.*, 90 F.3d 38, 42 (2d Cir. 1996), which merely repeats the same legislative history.

person.'" 848 F.2d at 1155 (emphasis added).[13] This question does not merit review.

C. Certiorari Should Not Be Granted To Decide Whether Courts Should Apply A Nontextual "Threshold" Requirement That The Party Seeking Discovery Show That The Material Is Already Discoverable In The Foreign Proceeding

After rejecting the district court's mistaken conclusion that a § 1782 order would be improper merely because the EC proceedings are currently in their investigative stage, the court of appeals went on to reject Intel's additional argument that AMD should be required to prove that the requested materials would be discoverable in the EC proceeding.[14] "[N]othing in the plain language or legislative history of Sec-

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[13] The court did go on to suggest that "a private individual may need to be a litigant in a pending proceeding in order to be an 'interested person," 848 F.2d at 1155, but that question was not before the court in the case, which involved a request from a foreign official. Accordingly, this statement is simply dictum—and equivocal dictum at that, stating no more than that a private individual "may" need to be a litigant. Intel also points (Pet. 17) to a First Circuit decision that says simply this: "Pursuant to 28 U.S.C. § 1782(a), district courts are authorized to assist foreign and international tribunals, and the litigants before such tribunals, in obtaining discovery in the United States for use in proceedings abroad." *In re Application of Asta Medica S.A.*, 981 F.2d 1, 2 (1st Cir. 1992). That is not a holding on any issue, nor does Intel claim it to be.

[14] It is undisputed that the material is discoverable under EC law in the sense that the EC could require its production. Intel argues that the EC could not require production of *business secrets*, Pet. 10-11 (citing *AKZO Chemie BV v. E.C. Comm'n*, [1987] 1 C.M.L.R. 231, 259 (3 E.R. 575)), but there has been no finding in this case that the materials AMD seeks are, in fact, "business secrets," and AMD expressly stated to the district court that its request for discovery did not include any business secrets, *see* Supp. E.R. at 11-12 ("We're quite willing to work with Intel to avoid having them dump on us a massive amount of irrelevant material. . . . We're certainly not interested in Intel's business secrets. . . . So the concept that we're somehow interested in look at Intel's business secrets . . . is a straw man.").

tion 1782," the court explained, "require[s] a threshold showing on the party seeking discovery that what is sought be discoverable in the foreign proceeding." Pet. App. 8a.

Both the Second and Third Circuits agree with the decision below that "imposing a requirement that the materials sought be discoverable in the foreign jurisdiction would be inconsistent with both the letter and spirit of the statute." *In re Bayer AG*, 146 F.3d 188, 193 (3d Cir. 1998); *see In re Application of Gianoli Aldunate*, 3 F.3d 54, 57 (2d Cir. 1993) ("*Aldunate*"). As the Second Circuit has explained:

> The statutory language is unambiguous in its requirements [and] makes no reference whatsoever to a requirement of discoverability under the laws of the foreign jurisdiction. Indeed, the only language in section 1782 arguably relevant to the issue of whether the district court must adopt the discovery requirements of the foreign jurisdiction is permissive language, stating that the practice and procedure prescribed by the district court "*may* be in whole or part the practice and procedure of the foreign country or the international tribunal." . . . [W]e are not free to read extra-statutory barriers to discovery into section 1782.

Aldunate, 3 F.3d at 58-59 (citation omitted). The legislative history is also "devoid of any indication that Congress intended to limit the scope of § 1782 to those situations in which the discovery sought would be discoverable under the laws of the foreign jurisdiction." *Bayer*, 143 F.3d at 193. The principal drafter of the statute has confirmed the purpose reflected in the plain text: "Under the laws of many foreign countries, parties may not be heard as witnesses and party statements are not considered testimony. By specifically referring to statements, Section 1782 makes clear that the district court may order that parties and other persons, whose statements do not qualify as testimony under foreign prac-

tice, may be heard." Smit, *International Litigation*, *supra*, at 1026; *see also* Smit, *Recent Developments in International Litigation*, 35 S. Tex. L. Rev. 215, 234-38 (1994) (statute intended to make discovery available where the same would not be discoverable under foreign law). In short, "[i]f Congress had intended to impose an additional element as restrictive as a requirement that the materials sought be discoverable in the foreign jurisdiction, it would have done so explicitly." *Bayer*, 146 F.3d at 193.

Congress's decision not to include a rigid discoverability requirement reflects sound policy judgments—judgments committed to Congress, not the courts. Congress reasonably concluded that, as Judge Calabresi explains, "making the extension of American assistance dependant on foreign law would open a veritable Pandora's box" as "a request for cooperation [would] turn into an unduly expensive and time-consuming fight about foreign law," and become "a battle-by-affidavit of international legal experts" likely to result in a "superficial" analysis of foreign law. *Euromepa I*, 51 F.3d at 1099 (citation omitted). Nor would Congress have been concerned that § 1782 discovery would work an affront to foreign jurisdictions by allowing parties to "side-step foreign discovery limitations." Pet. 9. Foreign courts "can quite easily protect [themselves] from the effects of any discovery order by [a] district court that inadvertently offend[s] [foreign] practice" by exercising their own rules of admissibility. *Euromepa I*, 51 F.3d at 1101.

The court of appeals' decision to follow these courts in declining to imprint a nontextual discovery requirement onto § 1782 does not merit review by this Court. As noted above, there is as yet no actual discovery order, rendering it impossible to evaluate fairly many of Intel's claims about the policy significance of a discoverability requirement. For instance, even though EC investigators have *thus far* declined to seek the requested documents themselves, it is impossible

to know what these investigators' reaction would be upon actually seeing the documents, should they prove especially probative. And as already explained (*supra* note 9), the fact that EC investigators have not yet sought the documents tells us nothing at all about how the EC *courts* would value the documents, once AMD submits them as it is entitled to do under EC procedures. The most reasonable presumption is that courts would *not* arbitrarily ignore probative evidence submitted by AMD: "[A]lthough a foreign court might not compel production of the evidence in the manner employed by an American court, it might very well, and ordinarily would, readily accept and rely on the evidence obtained with the help of the American court." Smit, *Recent Developments*, *supra*, at 236. In short, the assumption that § 1782 discovery would be "inconsequential" to the EC proceeding—the assumption on which Intel predicates both its plea for review and its argument on the merits—cannot be meaningfully tested in the complete absence of any actual record of what documents Intel actually would be ordered to produce.

Finally, there is no intolerable conflict in the judgments of the relevant circuit court decisions. Intel cites an opinion of the Fifth Circuit as evidencing a conflict, but the holding of the case is in alignment with the court below. *See In re Letter Rogatory from First Court of First Instance in Civil Matters, Caracas, Venezuela*, 42 F.3d 308, 310 (5th Cir. 1995) (holding that in § 1782 request from foreign court, "no such discoverability determination is required").[15] Intel also

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[15] The court did think that *other* courts have "undertaken a discovery determination when the request for information comes from a private litigant," 42 F.3d at 310, but this was not the issue before the Fifth Circuit, and the court made no ruling on that question. The court in *In re Application of Time, Inc.*, 1999 WL 804090 (E.D. La. Oct. 6, 1999), agreed that "the Fifth Circuit's statement about private litigants was dictum," and went on to hold that the judgments of the Second and Third Circuits are "persuasive." *Id.* at *3. That decision was summarily af-

cites the Eleventh Circuit's decision in *Trinidad & Tobago*. Pet. 9. That case did not focus on the question of discoverability at all. The question before the court was whether § 1782 requires that a foreign proceeding be "pending," a position the court rejected. 848 F.2d at 1152. The court went on, however, to explain that the district court had not abused its discretion in ordering production because the documents were discoverable in the foreign jurisdiction. *Id.* at 1156. In dictum the court suggested that a district court must make such a determination, *id.*, but the only circuit precedent cited by the court was a Third Circuit case, *John Deere Ltd. v. Sperry Corp.*, 754 F.2d 132 (3d Cir. 1985), which the Third Circuit itself later expressly held did *not* establish any discoverability requirement, *Bayer*, 146 F.3d at 193 ("This case presents us with our first opportunity to revisit our opinion in *John Deere*, and we use the occasion to make explicit our view that imposing a requirement that the materials sought be discoverable in the foreign jurisdiction would be inconsistent with both the letter and spirit of the statute."). The Third Circuit even cited *Trinidad & Tobago* specifically as having misunderstood *John Deere*. *See* 146 F.3d at 193. The Eleventh Circuit has not had the opportunity address this evisceration of the only circuit precedent cited in support of the *Trinidad & Tobago* dictum.[16] Further

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firmed by the Fifth Circuit. 209 F.3d 719 (5th Cir. 2000) (unpublished decision).

[16] The Eleventh Circuit cited the *Trinidad & Tobago* dictum in *United Kingdom v. United States*, 238 F.3d 1312, 1319 (11th Cir. 2001), cert. denied 534 U.S. 891 (2001), but it was equally immaterial to the outcome there: the court below had found that the material was discoverable, but denied discovery for other reasons. *Id.* at 1319. *In re Lo Ka Chun*, 858 F.2d 1564 (11th Cir. 1988) (cited in Pet. 9), reversed a district court for making "no determination as to the discoverability of the evidence contemplated herein." *Id.* at 1566 (emphasis added). *Lo Ka Chun* relied on *Trinidad & Tobago*, but was decided before the Third Circuit held that *Trinidad & Tobago* misconstrued Third Circuit precedent.

percolation could easily resolve the issue in the Eleventh Circuit.

The same is true for the asserted conflict with the First Circuit's opinion in *In re Application of Asta Medica S.A.*, 981 F.2d 1 (1st Cir. 1992). Pet. 8-9. In holding that the district court was required in that case to determine the discoverability in the foreign jurisdiction of the requested material, the only circuit court holdings relied upon by the First Circuit were the Third Circuit's *John Deere* opinion and the Eleventh Circuit opinions mistakenly interpreting *John Deere* as requiring proof of discoverability. *See* 981 F.2d at 6. In *Bayer*, the Third Circuit also cited *Asta Medica* as having misinterpreted *John Deere*'s holding. *See* 146 F.3d at 193. Like the Eleventh, the First Circuit has not yet had occasion to revisit the issue in light of *Bayer*; accordingly, further percolation could resolve the issue in favor of the statute's plain text the First Circuit as well.

In short, the alleged circuit split on the question whether courts should read a rigid requirement of discoverability into the text of § 1782 turns out to be more anticipated than real, depending on whether the First and Eleventh Circuits continue to adhere to their erroneous reading of *John Deere* and the statute. The discoverability thus would not merit review at this time in any case, much less in this one, where the issue is presented only hypothetically, on the basis of a nonexistent record. The last time the same set of cases was presented to the Court as constituting a division in authority warranting certiorari, *see* Pet. for a Writ of Cert., *Foden v. Gianoli Aldunate* (No. 93-513), the Court denied the writ, *Foden v. Gianoli Aldunate*, 510 U.S. 965 (1993). There is all the more reason to do the same here.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

PATRICK LYNCH
(*Counsel of Record*)
O'MELVENY & MYERS LLP
400 South Hope Street
Los Angeles, California 90071
(213) 430-6000

JONATHAN D. HACKER
JOSHUA P. WALDMAN
O'MELVENY & MYERS LLP
555 13th Street, N.W.
Washington, D.C. 20004
(202) 383-5200

Attorneys for Respondent

Dated: December 13, 2002

APPENDIX

NOT FOR CITATION
IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

ADVANCED MICRO DEVICES, INC., Appellant, v. INTEL CORPORATION, Respondent.	No. C 01-7033 MISC JW (HRL) INTERIM ORDER

Advanced Micro Devices (AMD) has applied for an order directing Intel Corporation (Intel) to produce documents pursuant to 28 U.S.C. § 1782. Having considered the moving papers and supporting documents in this case, the Court orders AMD to submit a more specific request and continues the hearing date as discussed below.

I. BACKGROUND

A. The European Commission Complaint

On October 23, 2000, AMD filed a complaint with the European Commission against Intel for engaging in anti-competitive behavior in violation of European competition laws. (See AMD's Application for Order, dated 10/1/01). Specifically, the complaint alleged that Intel abused its dominant position in the Windows capable microprocessor market through: (1) granting loyalty rebates and imposing exclusive purchasing obligations on manufacturers of personal computers and retailers; (2) pricing discrimination and refusing to supply necessary components [to] new Intel products and product information to manufacturers as retribution for buying from AMD; and (3) entering into standard-setting cartels with other manufacturers to the competitive

injury of firms net allowed timely access to the standard specifications. (See AMD's Application for Order, dated 10/1/01).

Under European Commission procedure, the complaining party is to provide supporting evidence to its claims, and the Commission has the power to require the respondent company to produce documents. (Brinker Decl. ¶¶ 14 & 8). In the present case, the Commission submitted written questions to Intel regarding AMD's allegations. (Lynch Decl. ¶ 3). AMD was provided with a redacted copy of this response and engaged Professor Jeffrey MacKie-Mason to make an economic evaluation of Intel's position. (Lynch Decl. ¶¶ 3 & 4).

Professor MacKie-Mason had served as an economic consultant to Intergraph Corporation in an action in the Northern District of Alabama, *Intergraph Corporation v. Intel Corporation*, CV 97-N-3023-NE. (Lynch Decl. ¶ 1 4). Through this collaboration, AMD alleges that it became aware that certain documents produced in the *Intergraph* action would impeach Intel's positions in the current matter or would support AMD allegations. (Lynch Decl. ¶ 4).

B. AMD's Application Under 28 U.S.C. § 1782

On October 1, 2001, AMD filed an application for an order directing Intel to produce documents pursuant to 28 U.S.C. § 1782. Specifically, AMD sought an order directing Intel to "produce in electronic format, the Intel documents produced to Intergraph Corporation in the case of Intergraph Corporation v. Intel Corporation, CV 97-N-3023-NE, United States District Court for the Northern District of Alabama, Northeast Division (the "Intergraph case") and the transcripts of depositions of Intel employees taken in the Intergraph case." (See AMD's Application for Order, dated 10/11/01).

C. The District Court and Ninth Circuit Rulings

AMD's application was heard by Judge William Ingram. On December 11, 2001, Judge Ingram denied AMD's request and issued a memorandum of decision on January 7, 2002. Judge Ingram agreed with Intel that 28 U.S.C. § 1782 did not apply in this case. AMD appealed to the Ninth Circuit.

In an opinion filed on June 6, 2002, the Ninth Circuit reversed the district court, holding that the proceeding at issue here qualified as a "proceeding before a tribunal" under 28 U.S.C. § 1782. Advanced Micro Devices, Inc. v. Intel Corp., 292 F.3d 664, 668 (9th Cir. 2002). The Ninth Circuit remanded the case for determination of AMD's request on the merits. Id. at 669. On September 24, 2002, the Ninth Circuit denied Intel's request to stay issuance of the mandate pending the filing and disposition of a petition for a writ of certiorari. On October 2, 2002, AMD noticed a hearing to renew its application under 28 U.S.C. § 1782.

D. Intel's Objections to Production

Intel has objected to the production on the grounds that the documents sought are irrelevant, that AMD's request is overbroad and unduly burdensome, that the burden and expense of compliance with the request outweigh the benefit, that the discovery sought will not assist the European Commission, and that the proposed protective order offers insufficient protection. Additionally, Intel has submitted published reports that the European Commission closed its investigation of Intel. (See Intel's Supplemental Opposition). Intel notes that AMD has filed additional allegations, but that it is unaware of the substance of those allegations. (See Intel's Supplemental Opposition). AMD has not provided the court with an explanation of which allegations, if any, are presently before the European Commission.

E. The Intergraph Case

Intel has informed the court that the Intergraph case included claims for patent infringement, state law violations, and antitrust claims. (Bernhard Decl. ¶¶ 3-5). The antitrust claims asserted that: (1) Intel's decision not to supply Intergraph with the patented Intel sample and pre-release microprocessors constituted monopolization of the microprocessor market; (2) Intel violated Section 2 of the Shearman Act by using its monopoly in microprocessors to leverage a competitive advantage in the downstream markets of workstations, graphics accelerators and chipsets; and (3) Intel conspired with Intergraph workstation competitors to hinder Intergraph's sale of workstations to a few specific accounts engaged in the digital animation business. (Bernhard Decl. ¶ 14). Supposedly, Intergraph made no allegations with respect to Intel's conduct in Europe. (Bernhard Decl. ¶ 6).

Intel has also advised the court of the immense scope of discovery in the Intergraph case. Specifically, Intel was served with approximately 603 request for .production and made available fur inspection approximately 1,455 boxes of documents totaling 2.75 million pages. (Bernhard Decl. ¶¶ 16 & 28). Intergraph deposed sixty Intel employees and received other deposition transcripts from Intel employees from a FTC case. (Bernhard Decl.¶ 31). Intel argues that 60% of the document requests sought documents related solely to the patent disputes and a large portion of the remaining requests focused on documents regarding the parties' business relationship and dealings. (Bernhard Decl. ¶ 21). (Interestingly, Intel does not say for how many of the 603 document requests did it actually produce, and in what quantity, responsive documents.)

II. LEGAL STANDARD

28 U.S.C. § 1782 provides in relevant part, "The district court of the district in which a person resides or is found may order him . . . to produce a document or other thing for use in a proceeding in a foreign or international tribunal . . . . The order may be made . . . upon application of any interested party . . . ." The court has broad discretion to grant or deny such an application. Four Pillars Enterprises Co. v. Avery Dennison Corp., 308 F.3d 1075, 1078 (9th Cir. 2002). Courts have looked to the Federal Rules of Civil Procedure for guidance in exercising this discretion. See 28 U.S.C. § 1782 (referencing the Federal Rules of Civil Procedure); In re Letters Rogatory from the Tokyo Dist. Prosecutor's Office, Tokyo, Tanan (Okubo), 16 F.3d 1016 (9th Cir. 1994) (considering appellants' argument that evidence was taken in violation of the Federal Rules of Civil Procedure); In re Application of Edelman, 295 F.3d 171, 181 (2d Cir. 2002) (remanding for consideration of whether Rule 45 barred a deposition, even after determining that 28 U.S.C. § 1782 applied).

III. CONCLUSION

The Court is prepared to address the merits of Advanced Micro Devices' (AMD) request pursuant to 28 U.S.C. § 1782 for production of documents produced by Intel Corporation in the Intergraph case. However, as currently framed, AMD's request is overbroad. Requiring Intel now to produce all of its documents produced and all deposition transcripts of its employees taken in the Intergraph case would undoubtedly include some (perhaps, many) documents and transcripts that have no connection or relationship to the proceedings before the European Commission. Stated differently, AMD does not show that it should have all the documents and deposition transcripts. Accordingly, the Court orders as follows:

1) By December 31, 2002, AMD shall file an amended application pursuant to 28 U.S.C. § 1782. This application

shall explain, with reasonable particularity, AMD's allegations presently pending before the European Commission. Further, it "shall set forth, either by individual item or by category, the items to be inspected and describe each with reasonable particularity" and be limited to documents that are relevant to the pending allegations. Fed. R. Civ. P. 34.

2) Any opposition or objection to AMD's amended application shall be filed by January 7, 2003.

3) AMD's reply, if any, shall be filed by January 9, 2003.

4) The Court shall hear this matter on January 10, 2003 at 10:00 a.m. in Courtroom 2. At that time, the Court will also hear argument on Intel's contingent request for document production. The previous hearing date of December 17, 2002 at 10:00 a.m. is vacated.

5) The parties may submit a proposed protective order to a document production, if any is ordered, at any time prior to production.

Dated: 12/11/02

/s/
HOWARD R. LLOYD
UNITED STATES MAGISTRATE JUDGE